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ALEXANDER L. STEVAS,

No. 83-219

In The
Supreme Court of the United States
October Term, 1983

GARY McDONALD,

Petitioner,

vs.

CITY OF WEST BRANCH, MICHIGAN; PAUL LONGSTREET, CHIEF OF POLICE; BERNARD C. OLSON, CITY MANAGER; CHARLES W. JENNINGS, CITY ATTORNEY; DEMETRE J. ELLIAS, CITY ATTORNEY; UNITED STEELWORKERS OF AMERICA, DISTRICT 29,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

1. Should unappealed arbitration awards—as distinguished from state court decisions—be given preclusive effect in cases brought under 42 U. S. C. § 1983?

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Respondents will not submit a separate statement of the case, but wish to expand upon and clarify certain specific points.

McDonald did, indeed, file a grievance under the union collective bargaining agreement claiming a violation of article 3 of the union contract. (J.A. 26)

Article 3, § 3.0 of the union contract provides that the City has the right to " . . . demote, suspend or discharge

employees for proper cause". (J.A. 47) No mention was made in the grievance of any violation of article 1, § 1.2, entitled "No Discrimination Because of Union Activities". (J.A. 46)

Nor did the plaintiff claim at the arbitration hearing that his discharge was in retaliation for union activities.

Testimony was taken at arbitration with regard to charges 6 and 7.[1] The arbitrator did consider whether or not McDonald was discharged for making disrespectful, derogatory or slanderous remarks; for falsely accusing the chief of police; or for attempting to undermine the authority of the chief. He determined that although such expressions were outspoken and tactless, they could not be just cause for discharge. (J.A. 40-41)

McDonald's claim in federal court was not that his constitutional right to free speech was violated by his discharge, but that he was fired for "union activities". (J.A. 5)

The question asked on the special interrogatory directed to the jury was whether or not he was discharged from his position as a police officer in retaliation for, or to suppress, his union activity, and, therefore, in violation of his first amendment right to freedom of speech or association. (J.A. 15)[2]

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[1]Charge 6 was disrespectful, derogatory and apparent slanderous remarks made publicly, while on duty, against city officials. Charge 7 was falsely accusing the chief of police of indecent conduct in attempting to undermine his authority; also a slow-down in enforcement action.

[2]The above reference is to the appendix to the printed petition for writ of certiorari.

Whether McDonald's union activities prompted the firing was not submitted to the arbitrator and he did not consider it.

We take issue with petitioner's statement that the defendant refused to reveal the name of the minor female and the place of the "sexual assault" to McDonald until the arbitration hearing.

After the submission was made to arbitration on February 9, 1977, McDonald was represented by two attorneys provided by the union.

Mr. Jennings, City Attorney, testified at trial that no request was ever made to the arbitrator or to him for any specific details regarding the names of the complainants. (Tr. 716-717)

There was no objection at the arbitration hearing in July, 1977, that McDonald was not prepared to proceed. (D Tr. 96)

In response to the charge that the city failed to disclose to McDonald the investigative report on the "Dack" incident concluded on October 30, 1976, it should be noted that although the "Dack" incident had been closed on that date, as stated by petitioner, the basis of the "Dack" charge was renewed subsequent to that date by a written statement of Barbara Dack given to Gloria Oswald on November 23, 1976. (Tr. 497, 502)

At the conclusion of the six-day trial, the jury found for McDonald against Chief Longstreet only. The jury also found that plaintiff was not deprived of a due process hearing concerning his discharge.

The Sixth Circuit Court of Appeals found no abuse of process. (A. 3)

SUMMARY OF ARGUMENT

Neither 42 U. S. C. § 1983's legislative history or case law suggests that Congress intended to override 28 U. S. C. § 1738. Rather, they evidence an intent to prevent a § 1983 plaintiff from relitigating a claim resolved against him when there is no evidence of an unwillingness or inability on the part of the state to protect the claimant's federal rights.

The "full faith and credit" clause, 28 U. S. C. § 1738, as interpreted by this court in *Allen v. McCurry*, 449 U. S. 90 (1980), dictates that preclusive effect must be applied by the federal courts to state court decisions whenever the state from which the judgment emerged would do so.

In Michigan, a valid and final arbitration award becomes the law of the case subject only to judicial vacation and has the same effect for purposes of claim preclusion as does a court judgment.

Michigan adheres to the proposition set forth in the Restatement of the Law of Judgments, 2d, § 27, that when an issue is actually litigated and a determination is made in a valid and final judgment, that determination is conclusive as to the parties in any subsequent suit.

A binding arbitration proceeding to resolve a dispute between an employer and an employee in accordance with a collective bargaining agreement provides an inexpensive, efficient and expeditious resolution of a labor grievance.

Labor has an acknowledged interest in McDonald's *individual and collectively* bargained-for contractual right

to be free of discrimination on account of his union activities.

The ruling in *Alexander v. Gardner-Denver Company*, 415 U. S. 36 (1974), does not govern the disposition of this case. Title VII of the Civil Rights Acts of 1964 was designed to eradicate discriminatory employment practices based on race, color, religion, sex and national origin. Unlike 42 U. S. C. § 2000e, *et. seq.*, § 1983 does not apply to purely private discrimination or deprivation of rights.

Petitioner's argument that the phrase "final responsibility" in *Alexander v. Gardner-Denver Company* means that Title VII complainants are entitled to *de novo* federal review ignores this Court's more recent decision in *New York Gaslight Club, Inc. v. Carey*, 447 U. S. 65 (1980). Initial resort should be made to state and local remedies. Recourse to a federal forum is only appropriate when the state does not provide an adequate due process remedy.

§ 1983 actions are intended to supplement and not supplant state remedies. The mere fact that the petitioner asserts a federal claim does not assure him a day in federal court, nor does precluding a litigant from a trial *de novo* in federal court mean that the petitioner was deprived of a judicial forum.

As a matter of public policy, federal courts should not relitigate issues once determined in arbitration proceedings which provide due process.

ARGUMENT

I.

Petitioner's interpretation of 28 U. S. C. § 1738 and 42 U. S. C. § 1983 contravenes public policy and the intent of Congress to preclude judicial review absent abuse of process.

This Court in *Allen v. McCurry*, 449 U. S. 90 (1980), held that the preclusion rule emanating from the full faith and credit clause of the United States Constitution, U. S. Const. art. IV, § 1, applies to § 1983 litigation.

The implementing legislation, § 1738, applies to both federal and state courts. Preclusion effect will be withheld from state court decisions only in the event the state court has evidenced an unwillingness or inability to protect the claimant's federal rights. This allows redress in the event of inferior state remedies.

This statute was enacted just after ratification of the Constitution, Act of May 26, 1790, ch. 11, 1 Stat. 122; reenacted soon after, Act of March 27, 1804, ch. 56, 2 Stat. 298-299; and has been virtually unchanged since its enactment. *Allen v. McCurry* recently reaffirmed this Court's traditional position that under § 1738, federal courts are *required* to give preclusive effect to state court judgments whenever the court of the state from which the judgment emerges would do so.

Nothing in the legislative history of § 1983, or the Civil Rights Act of 1871, shows any congressional intent to deny binding effect to a state court determination where the state court has acted within its proper jurisdiction and has afforded the litigant a full and fair opportunity to raise federal claims, thereby showing itself

to be willing and able to protect the federal rights of its citizens. *Allen v. McCurry, supra.*

This principle is inapplicable only when state substantive law is facially unconstitutional; where the state procedural law is inadequate to allow full litigation of the constitutional claim; or where the state procedural law, though adequate in theory, is inadequate in practice. *Monroe v. Pape,* 365 U. S. 167, at 173-174 (1961).

Furthermore, *Allen* holds that every grievant is not entitled to one unencumbered opportunity to litigate his claim in a federal court regardless of the legal posture in which the federal claim arises.

A.

Alexander v. Gardner-Denver Company is not binding precedent, nor conclusively persuasive, in § 1983 suits.

Unlike 42 U. S. C. § 2000e, *et seq.*, § 1983 does not apply to purely private discrimination or deprivation of rights.

The goal of the Civil Rights Act of 1871, now § 1983, was to combat the corrupting influence of the Ku Klux Klan in the state courts and law enforcement agencies in the southern states. The primary concern was that the state courts had been ineffective in protecting federal rights. *Allen v. McCurry, supra.*

The core language in § 1983 is:

> "Every person who, *under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia,* subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or im-

munities secured by the Constitution and laws, . . ." (Emphasis added.) 42 U. S. C. § 1983.

Title VII of the Civil Rights Act of 1964, on the other hand, is an implementation of a national policy to assure equality of employment opportunities without discrimination in respect to race, color, religion, sex or national origin. *Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454 (1975). Adopted almost 100 years after the "Ku Klux Klan" Act, its purpose was to prohibit private discrimination in employment.

In Title VII cases, employers, labor organizations, employment agencies, as well as certain labor and management committees are the "persons" forbidden to discriminate. 42 U. S. C. § 2000e-2.

The legislative history affirms the congressional intent to seek ways in which an *individual* complainant could be assured of a full and adequate statutory and judicial remedy. The result was a work-sharing concept wherein the Equal Opportunity Employment Commission would work with the state agencies. The law gave the federal courts the ultimate responsibility for reviewing the adequacy of the state remedies and procedures on a case-by-case basis after the state proceedings had ended. Thus, as stated in *Allen*, the preclusion doctrine is the tool which the federal courts may use to dispose of those cases which are "fully and fairly litigated".

In those instances where the state remedies conform to Title VII substantive standards, res judicata or collateral estoppel may preclude complainants from seeking additional relief under Title VII. This philosophy was reiterated in *New York Gaslight Club, Inc. v. Carey, supra.*

Congress, in enacting § 1983, was cognizant of the fact they were altering the balance of judicial power between the states and the federal government. The thread that ran through the debates was that it should encompass the philosophy that state courts would retain their jurisdiction so that when the perceived discriminations had abated, the balance of judicial power would, in effect, be as originally envisoned.[3] *Martinez v. California,* 444 U. S. 277, 283-284, n. 7 (1980).

Unlike Title VII, § 1983 does not mandate that the federal courts provide *de novo* review of issues raised, or which could have been raised, in state proceedings. Thus, federal courts in § 1983 cases, as opposed to Title VII cases, supplement, not supplant, state remedies by assuming jurisdiction in the event a complainant does not have access to a full and adequate remedy. There is no mandate that federal courts be the last resort for a civil rights remedy, *Alexander v. Gardner-Denver Company* notwithstanding.

B.

Non-deferral policies established by this court in FLSA cases are not binding in § 1983 actions.

It is certainly true that this Court has applied the *Alexander* holding on non-deferral to arbitration in other cases. *Barrentine v. Arkansas-Best Freight Company,* 450 U. S. 728 (1981). However, *Barrentine* does not compel the same result in this case.

Arkansas-Best argued that because this was a wage dispute, it clearly came within the four corners of the col-

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[3]Note that state courts may entertain § 1983 claims.

lective bargaining agreement. The district court noted that if the collective bargaining agreement was read literally, it would require compensation for the time petitioners were on company business doing pre-trip safety inspections. However, this Court held that such construction misperceived the nature of the petitioner's FLSA claim. 29 U. S. C. § 201 *et seq.*

The majority ruled that FLSA was designed specifically to give minimum protection to *individual* workers and to ensure that *each* employee covered by the Act receives a fair day's pay for a fair day's work. The Court denied preclusion noting that no other form for enforcement of the statutory right is referred to or created by the statute. *Brooklyn Savings Bank v. O'Neil,* 324 U. S. 697 (1945).

The underlying principle in FLSA was to encourage employees to enforce their rights in court, thereby furthering the public policies underlying the FLSA. It is obvious that this Court equated an individual's rights to non-discrimination in employment practices to an individual's right to a minimum wage and to overtime pay under the FLSA. These are both uniquely individual rights in employment which apply to private discrimination or private deprivation of rights which cannot be waived or abridged under contract. Nonetheless, the court acknowledged that ". . . courts should defer to an arbitral decision where the employee's claim is based on rights arising out of a collective-bargaining agreement. . . ." *id.* at 737.

C.

Federal courts may defer to state court proceedings in Title VII cases.

This Court evidenced its support for the concept of a cooperative effort maximizing the cooperation between federal and state enforcement proceedings in its decision in *New York Gaslight Club, Inc. v. Carey, supra.*

It allowed attorneys' fees to be awarded to the prevailing party for services rendered in a state administrative proceeding enforcing Title VII.

Rejecting the argument that § 706(k)[4] referred only to federal proceedings, this Court emphasized the need to encourage *state* participation in the enforcement of the objectives of Title VII.

In *New York Gaslight Club,* the federal court deferred to an "adequate" state administrative decision. Justice White, speaking for this Court, opined that when, under New York law, the petitioner would be precluded from relitigating the same grievance in that state's courts, § 1738 precludes relitigating the same question in federal court.

Respondents' argument that preclusion effect should not be given to "adequate" arbitration proceedings in subsequent civil rights suits appears to thwart the very policy espoused by Congress that *states* should be primarily responsible and actively encouraged to protect the civil rights of their citizens. § 1738 evidences the minimal

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[4]Civil Rights Act of 1964, § 706(k) as amended, 42 U. S. C. § 2000e-5(k).

amount of deference awarded state and territorial statutes and judicial proceedings.

Congress has already acknowledged that the federal judicial system cannot cope with the jurisdictional ingenuity of claimants and counsel in enacting § 1997e which adopted a limited exhaustion requirement in order to cope with the volume of certain § 1983 claims of adult prisoners.[5]

D.

The Sixth Circuit decision in Becton v. Detroit Terminals of Consolidated Freightways, is not in conflict with its holding in this case.

The opinion of the Sixth Circuit in this case is not in conflict with its decision in *Becton v. Detroit Terminals of Consolidated Freightways*, 687 F. 2d 140 (6th Cir., 1982) (*cert. den.*) — U. S. —, 103 S. Ct. 1432 (1983).

Becton dealt with a § 1981 employment discrimination claim. Prior to suit, Becton filed his grievance complaining he was not fired for just cause. He did not raise a discrimination claim before the grievance committee. The committee found Becton had been discharged for "just cause" in an *unwritten decision*. Subsequently, Becton brought suit against the company and the union alleging racial discrimination and a retaliatory firing. The district court concluded from its reading of *Gardner-Denver* that the practice of excepting statutory discrimination claims from the general rule of finality of judgments should be narrowly circumscribed.

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[5] 42 U. S. C. § 1997e.

The Sixth Circuit disagreed, saying, "The court should defer to the arbitrator's construction of the contract." However, in Title VII or § 1983 actions, where it is difficult to sever the discharge from the claim of discrimination, a court is not conclusively bound by the arbitration panel's decision but may reconsider evidence rejected by the arbitrator in previous proceedings.

There may be some question that the reference to § 1983 may have been a typographical error. Note that the footnote to the statement: "In our view, *Gardner-Denver* should not be read as a restriction on the extent to which a Title VII or § 1983 claimant is entitled to develop his evidence of discrimination", says as follows:

> "3. Although *Gardner-Denver* was under Title VII of the Civil Rights Act, the court noted that § *1981* (sic) affords similar protection." 415 U. S. at 47, n. 7; 94 S. Ct. at 1019, n. 7. (Emphasis supplied.)

II.

As a matter of public policy, federal courts should not relitigate issues once determined in arbitration proceedings which provide due process.

A.

Michigan provides opportunity for judicial review of all common law and statutory arbitration proceedings.

The philosophy behind the judicial role in reviewing arbitration awards was stated by our Supreme Court in *Grand Rapids v. F. O. P.*, 415 Mich. 628, 330 N. W. 2d 52 (1980):

> **"The preference for arbitration in Michigan in federal labor law is triggered only if the parties agree to arbitrate. That preference does not operate to over-**

> ride the intent of the parties. The law does not require the employer, the union, or the employee members to forego judicial resolution of disputes concerning the meaning of a collective-bargaining agreement. They may choose to submit disputes to an arbitrator in preference to a judge and, if they agree to that, the law enforces their stated or agreed-upon preference. It is by enforcing the agreement of the parties in lieu of adjudication that the law 'prefers' arbitration." *id.* at 635.

Stowe v. Mutual Home Builders Corp., 252 Mich. 492, 233 N. W. 391 (1930), established that parties to common law arbitration have the right to bring an action in circuit court either to confirm or to vacate the arbitration award.

Typical of this type of review is the factual situation found in *Felters Company v. Local 318*, 108 Mich. App. 333, 310 N. W. 2d 233 (1981). In that case, the grievant protested her discharge by filing a grievance which went to arbitration. The arbitrator found that she had been improperly discharged. The company went to circuit court to vacate the award alleging the arbitrator had exceeded his authority.

The circuit court agreed and remanded the cause to the arbitrator for a decision consistent with the collective bargaining agreement. On remand, the arbitrator decided to overrule the circuit court, holding the circuit court did not have general jurisdiction, absent fraud, because the parties bargained for arbitration and not for judicial review to determine the rights and merits of the contractual relationship. The arbitrator affirmed the award as initially rendered. The company went back to circuit court and moved to have the award vacated. They also asked

for an order of superintending control over the arbitration proceedings. The circuit court vacated the arbitration award ordering that the grievant not be reinstated. The union appealed the decision.

Appeal was taken directly from the decision of the circuit court to the court of appeals by right.

On review, the Michigan Court of Appeals adopted this Court's standard of review in the *Steelworkers' Trilogy* saying:

> "Questions concerning the scope of judicial review of arbitrability in the awards made by arbitrators in labor disputes have been almost a plague on both state and federal courts for years, but the eminently proper attitude that we have taken is one of 'hands off'. The party that ends up holding the short end of the arbitrator's award may try desperately to fit the facts within the narrow doorway to the courts, but the judicial policy is clear. In the *Steelworkers' Trilogy*, the United States Supreme Court held that the merits of either the grievants or the arbitration award are irrelevant when a federal court is asked to enforce an arbitration agreement or award thereunder. Judicial review is limited to whether the award 'draws its essence' from the contract and whether the award was within the authority conferred upon the arbitrator by the collective bargaining agreement. Once substantive arbitrability is determined (as it was in the court below), judicial review effectively ceases. The fact that the arbitrator's interpretation of a contract is wrong is irrelevant." *Ferndale Education Assn. v. School District for City of Ferndale, No. 1*, 67 Mich. App. 637, 642-643, 242 N. W. 2d 478 (1976).

The cite to *Ferndale*, by the *Felters* court, on the scope of judicial review of common law arbitration, omitted, however, to include a subsequent paragraph acknowledging

that there are exceptions to the rule of judicial deference once arbitrability has been established.

These exceptions, first noted by Justice Souris in his dissenting opinion, concurred in by two other judges of the Supreme Court, in *Frazier v. Ford Motor Company*, 364 Mich. 648, 655, 657, 112 N. W. 2d 80 (1960), included:

"(1) fraud on the part of the arbitrator;

(2) fraud or misconduct of the parties affecting the result;

(3) gross unfairness in the conduct of the proceeding;

(4) want of jurisdiction in the arbitrator;

(5) violation of public policy;

(6) want of entirety in the award." *Id.* at 655.

These exceptions were noted later with approval in *E. E. Tripp Excavating Contractors v. Jackson County*, 60 Mich. App. 221, 230 N. W. 2d 556 (1975), and most recently in *Detroit Automobile Inter-Insurance Exchange v. Gavin and Detroit Automobile Inter-Insurance Exchange v. Standfest*, 416 Mich. 407, 442 N. W. 2d 418 (1982).

Our Michigan Supreme Court said in the *DAIIE* cases:

> "We thing it is safe to conclude from this look at the past, as did the dissenters in *Frazier v. Ford Motor Company*, 364 Mich. 648, 655, 657, 112 N. W. 2d 80 (1961), that at common law the ground upon which the courts may vacate an arbitrator's award at least include (1) fraud on the part of the arbitrator or the party; (2) gross unfairness in the conduct of the proceedings; (3) lack of jurisdiction in the arbitrator; (4) violation of public policy." *Id.* at 441.

Judge Souris also addressed the question of the fairness of the hearing. He allowed that judicial formality in the conduct of the hearings or other procedures recognized as essential in judicial proceedings are not required in arbitration hearings. However, where the contract provides for specific procedures in the collective bargaining agreement which provide for arbitration, the intention of the parties should be followed.

The parties, by agreement, may also decide to voluntarily arbitrate their dispute under statutes providing a procedural scheme for the process.

> "VOLUNTARY ARBITRATION; VALIDITY.
>
> [] Sec. 9d.
>
> (1) Any labor dispute, other than a representation question, may lawfully be submitted to voluntary arbitration in the manner provided in this section. [However,] arbitration of labor disputes without complying with this section shall be valid if it has heretofore been under the common law." M. S. A. § 17.454 (10.3); M. C. L. § 423.9(d).

The statute further provides "[an] *agreement* to arbitrate an existing or future dispute shall be enforceable in equity by any circuit court having jurisdiction", and that any award rendered in this proceeding shall be enforceable at law or in equity as the agreement of the parties. (Emphasis added.) M. S. A. § 17.454(10.3); M. C. L. § 423.9(d).

Since Michigan courts have ruled that statutory and common law arbitration are co-existent in this state, an agreement for statutory arbitration may be created when the parties "agree that a judgment of any circuit court

shall be rendered upon the award made pursuant to such submission". *Frolich v. Walbridge-Aldinger Company*, 236 Mich. 425, 210 N. W. 2d 488 (1926); M.C.L. § 600.5001; M. S. A. § 27A.5001.

Such an agreement calls into play G. C. R. 1963, 769.1.[6] *E. E. Tripp Excavating Contractors v. Jackson County, supra*, at 236.

This court rule also provides a procedural scheme for review of arbitration awards in the circuit court.

We would point out that in this case, the submission to arbitration made by the staff representative of the Steelworkers' Union on behalf of the petitioner, Gary McDonald, contains the following language:

> "We agree that we will abide by and perform any award rendered hereunder and that a judgment may be entered upon the award." (J.A. 29)

In *Chippewa Valley Schools v. Hill*, 62 Mich. App. 116, 233 N. W. 2d 208 (1975), this procedure was adopted even though no mention was made in the case that the parties intended entry of judgment on the award.

In *Chippewa*, the parties were signatories to a written collective bargaining agreement covering the terms and conditions of the teachers employed at the plaintiff school. That agreement contained a five-step grievance procedure for resolution of any "claim by a teacher or the association that there has been a violation, misin-

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[6]Honigman & Hawkins, Michigan Court Rules Annotated, § 769.1.

terpretation, or misapplication of the agreement, or any rule, order or regulation of the board". *id.* at 117-118.

In 1973, Mrs. Hill filed a grievance pursuant to the collective bargaining agreement. After all the steps of the grievance procedure were exhausted, the issue went to binding arbitration. The parties were represented by counsel and fully participated in the proceedings. The arbitrator issued a 13-page opinion and award sustaining the grievance of Mrs. Hill.

Plaintiffs filed for vacation of the award pursuant to G. C. R. 1963, 769.9 (1) (c); and the defendants filed for confirmation pursuant to G. C. R. 1963, 769.8. After a hearing on both motions, the circuit court entered the order confirming the award of the arbitrator. In reliance on *Stowe v. Mutual Home Builders Corp., supra,* the Michigan Court of Appeals entertained jurisdiction on a factual situation identical to this one for vacation or confirmation of an award.

Michigan courts may defer to arbitration awards when there is concurrent statutory and common law jurisdiction over the arbitration. *Detroit Police Officers Association v. The City of Detroit,* 144 Mich. App. 275, 318 N. W. 2d 650 (1982).

In this important case, an action was commenced by the Detroit Police Officers Association to enforce an arbitrator's award for back pay. The plaintiff appealed the award as of right from a grant of summary judgment in favor of the defendant in district court. A conflict then arose because of a dispute between two bargaining units, the Detroit Police Officers Association and the Detroit Police Lieutenants and Sargeants Association, over a job reclassification and back pay.

The jurisdiction of the Michigan Employees Relations Commission[7] was invoked because the police officers are public employees and entitled under the Public Employees Relations Act[8] to have their disputes resolved before this administrative tribunal.

It had been previously held in *Detroit Fire Fighters Association v. Detroit*, 408 Mich. 663, 293 N. W. 2d 278 (1980), that once the jurisdiction of MERC is invoked, that the administrative tribunal must take jurisdiction and may not defer to the arbitral proceedings under the collective bargaining agreement. However, in *Detroit Police Officers Association*, the Michigan Court of Appeals held that even though MERC had jurisdiction of the representation issue and its decision takes precedence over the decisions on representation over both arbitration panels, the arbitration award may stand, neither party raised the back-pay issue before MERC. The court argued that forcing the parties to return to MERC on the back-pay issue or rearbitrate the issue would only add to the "convoluted procedural history of the case". Thus, the judgment of the trial court was reversed and the matter remanded for entry of the summary judgment enforcing the arbitration award in favor of the plaintiff.[9]

It is argued by the petitioner that *Detroit Fire Fighters Association* stands for the proposition that

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[7]The Michigan Employment Relations Commission (hereinafter "MERC").

[8]PERA 1947, P. A. 336, as amended by 1965, P. A. 379; M. C. L. 423.201, *et seq.*, M. S. A. 17.455(1), *et seq.*

[9]It is important to note in this case that the petitioner, McDonald, although a police officer and entitled to his administrative remedy under the Public Employees Relations Act as administered by MERC, never sought this remedy. It is acknowledged that in 1976, before the Supreme Court's decision in *Detroit Fire Fighters Association v. Detroit*, MERC did exercise prearbitral deferral.

Michigan's public policy does not favor public sector grievance arbitration. We do not agree with this position and rely instead on the more recent case of *Police Officers Association v. The City of Detroit, supra,* and the compulsory arbitration statute applicable to public police, fire department and emergency medical personnel. M. C. L. § 423.231 *et seq.;* M. S. A. § 17.455(31) *et seq.*

We would also like to point out that the *Detroit Fire Fighters Association* case was a four to three opinion by the Michigan Supreme Court, with a strong dissenting argument for reversal by Justice Williams on the issue of "pre-arbitral" deferral. Justice Williams was joined in his opinion by Justice Levin who wrote the opinion in *Kaleva-Norman-Dickson School District No. 6 v. Kaleva-Norman-Dickson School Teachers' Association,* 393 Mich. 583, 227 N. W. 2d 500 (1975), as well as Justice Kavanaugh. Justice Williams strongly argued that Michigan should have been controlled by the abundant decisions of the NLRB and the United States Supreme Court, as well as the United States Circuit Courts of Appeals which have addressed the pre-arbitral deferral issue. Since § 16 of the Public Employees Relations Act is virtually identical in language as to § 10, subds. (b), (c), and (e) of the NLRB from which the doctrine of pre-arbitral deferral arises, the court should have looked for appropriate guidance to the federal precedents. *id.* at 698.

Michigan courts, as well as the Sixth Circuit, apply res judicata to unappealed arbitration awards and administrative determinations. If not taken timely, they become final and by reason of the doctrines of res judicata and collateral estoppel, are not subject to collateral attack. *Badon v. General Motors Corp.,* 679 F. 2d 93

(1982); *Roman Cleanser Company v. Murphy,* 386 Mich. 698, 194 N. W. 2d 704 (1972).

B.

Michigan provides public employees with concurrent statutory remedies.

The Public Employees Relations Act is commonly referred to as "PERA".

The petitioner, McDonald, was a public employee and, as such, was entitled to process his grievance through the Michigan Employment Relations Commission.

In many respects, PERA is patterned after the National Labor Relations Act, and its decisions are often fashioned after decisions of the NLRB. *Detroit Fire Fighters Association v. Detroit, supra.*

Arbitration of disputes is appropriate for contracts entered into under PERA. *Kavela-Norman-Dickson School District No. 6 v. Kavela-Norman-Dickson School Teachers' Assn., supra.*

The significant differences between the federal act and PERA are that: (1) PERA prohibits strikes by public employees, M. C. L. 423.202, M. S. A. 17.455(2); and (2) procedures which relate to a statutorily unfair labor charge must be conducted pursuant to Chapter 4 of the Michigan Administrative Procedures Act, M. C. L. 423.216 (a); M. S. A. 17.455(16)(a); and (3) the requirement that MERC make findings of fact in the process of resolving the unfair practices complaint, which decision is reviewable as a matter of right in the court of appeals under the competent material and substantial evidence stand-

ard. M. C. L. 423.216(d), 423.216(e); M. S. A. 17.455(16) (d), 17.455(16) (e). If the petitioner McDonald, had chosen to pursue this statutory remedy, his complaint would have been resolved by the commission in accordance with administration process.

It should be noted, however, that while PERA creates certain rights and duties, it does not make provision for access to the courts for enforcement in the first instance. Our supreme court has held on numerous occasions that MERC is the *primary* form for the resolution of labor problems experienced by public employers and employees. *Rockwell v. Crestwood School District Board of Education*, 393 Mich. 616, 227 N. W. 2d 736 (1975). Also clear is the proposition that unless unusual circumstances are present, the failure to exhaust available administrative remedies provided by PERA precludes one from successfully invoking the jurisdiction of the courts for relief. The court's policy of abstention is premised upon the assumption of the availability of the adequate administrative remedy. *United Skilled Maintenance Trades Employees of the Board of Education of Pontiac v. Pontiac Board of Education*, 375 Mich. 573, 134 N. W. 2d 736 (1965). 1977 P. A. 266 limits the issues on review to whether or not the MERC order is supported by competent, material or substantial evidence of record. The review of MERC's decisions and orders in the court of appeals is on the record made before the commission. If the commission's findings of fact, as reflected by a proper record, are supported by competent, material and substantial evidence, they are inclusive and the court of appeals is bound thereby. M. C. L. 423.216(d); M. S. A.

17.455(16) (d); *Lake Michigan Federation of Teachers v. Lake Michigan College*, 60 Mich. App. 747, 231 N. W. 2d 538 (1975).

In spite of the statutory remedy, Justice Ryan made it very clear in *Detroit Fire Fighters Association* that:

> "Finally, in our analysis, it is emphasized that we find no legislative intent forbidding or discouraging voluntary private arbitration of public employee grievance disputes. Rather, we read PERA and related state statutes as manifesting a clear legislative intent that, once a party to a public sector employment collective bargaining relationship invokes MERC's jurisdiction under PERA, that party's complaint should be resolved by MERC in accordance with the statutory processes." *Id.* at 685.

Indeed:

> "'An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the *arbitration clause* is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage.' (Emphasis Supplied.) Absent an '*express provision* excluding [a] particular grievance from arbitration' or the '*most forceful evidence* of a purpose to exclude the claim', (emphasis supplied) the matter should go to arbitration. *KND School District*, 393 Mich. at 592." *Grand Rapids v. Lodge 97, F. O. P.*, 96 Mich. App. 226, 292 N. W. 2d 529 (1980).

C.

Michigan makes special provision for grievants seeking redress for discrimination in employment.

Our courts have stressed since *Pompey v. General Motors Corp.*, 24 Mich. App. 60, 179 N. W. 2d 697 (1970), the independence in scope, purpose and source of statu-

tory, civil and contractual remedies for alleged discrimination in private employment.[10]

In *Washington* the court of appeals followed this court's dictates in *Johnson v. Railway Express Agency, Inc., supra,* and *Alexander,* stressing the independence of the contractual, statutory and constitutional rights in discriminatory employment practices. This case, however, does not fall within the purview of the Civil Rights Commission or the Michigan State Fair Employment Practices Act, M. C. L. 423.301, *et seq.;* M. S. A. 17.455(1), *et seq.*

III.

Arbitration, when selected for final resolution of a labor grievance, should not be excepted from the doctrine of preclusion.

In *Allen,* Justice Stewart proposed that the only conceivable reason for finding a universal right to litigate in the federal courts is the general distrust of the capacity of the state courts to " . . . render correct decisions on constitutional issues". *id.* at 420.

Michigan has evidenced its willingness and ability to protect its citizens' federal rights. Binding effect should not be denied arbitration awards when state courts would not do so.

Only two basic questions arise in this case. The first is whether McDonald's grievance came within the parameters of the collective bargaining agreement.

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[10]*Civil Rights Commission ex rel. Boyd v. Chrysler Corporation,* 64 Mich. App. 393, 235 N. W. 2d 791 (1975); *Civil Rights Commission v. Clark,* 390 Mich. 717, 212 N. W. 2d 912 (1973); *Chrysler Corporation v. Michigan Civil Rights Commission,* 68 Mich. App. 283, 242 N. W. 2d 556 (1976); *Washington v. Chrysler Corporation,* 68 Mich. App. 374, 242 N. W. 2d 781 (1976).

Respondents argue that it did, asserting that the charge that McDonald was fired for his union activities is an unfair labor practice, both under the FELA and PERA.[11] The decisions previously cited make it eminently clear that Michigan encourages both common law and statutory arbitration remedies for resolving these grievances.

The second question is did McDonald have a full and fair opportunity to litigate all his claims in a state court system capable of protecting the civil rights of its citizens.

The Sixth Circuit Court of Appeals found no abuse of process.

It is also clear that in Michigan, unappealed arbitration awards are final. McDonald knew he had a right to appeal and chose not to. The award became final and subject to entry of judgment in the circuit court in accordance with the agreement of the parties as evidenced in the submission to arbitration. *Badon v. General Motors Corp., supra; Roman Cleanser Company v. Murphy, supra.*

Petitioner attacks the arbitration process as an inappropriate forum to provide for the protection of constitutional rights. This argument ignores the contractual aspects of the collective bargaining agreement which, by its very nature, is negotiated by the parties at arms' length admittedly subjugating some rights for the collective good.

In *Frazier,* the Michigan Supreme Court acknowledged the contractual nature of the bargaining agreement between the union and the company which binds the union

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[11]29 U. S. C. § 158; M. C. L. § 426.16; M. S. A. § 17.454(17).

member. Judge Kelly pointed out that constitutional limitations, such as due process, which the plaintiff in *Frazier* claimed was applicable to the arbitration proceedings, is without merit, due process being applicable only to government acts and not to private relationships.

Since *Frazier,* however, proponents of the arbitration models have agreed that minimal due process is required.

Petitioner's whole argument is premised on the concept that the holding in *Alexander* ought to be applied to § 1983 cases. *Alexander* is distinguishable in that that case talks about an individual right which Congress has decreed shall be vindicated only in a federal court. By the same token, this Court's holding in *Barrentine* makes clear that actions under the Fair Labor Standards Act arises out of the statute designed to provide minimum substantive guarantees to individual workers. The *Barrentine* court made it very clear that " . . . courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement . . ." *id.* at 737

This Court made it clear in *Allen v. McCurry* that federal courts may no longer look at vaguely supported general principles when a litigant enters a federal forum. They must, instead, look at the congressional intent to determine whether or not the claimant is entitled to a *de novo* trial after the state tribunal has adjudicated a claim or applied the doctrine of res judicata or collateral estoppel.

Since the preclusion doctrine is the tool which the federal courts may use to test the state court's willingness to protect the rights of its citizens, impliedly re-

pealing § 1738 in § 1983 cases should only be considered when there is a clearly expressed legislative intent to permit relitigation.

Labor arbitration enjoys a special status in the framework of the national labor policy. Extending the holding in *Alexander* strips the arbitral process of the unstructured flexibility which now characterizes private dispute resolution. Nothing is to be gained by depriving the parties of their desire to tailor their arbitration procedure to fit their own desires so long as there is a minimum level of procedural integrity maintained by the state through judicial review.

The risk that individual interest will become subordinate to the collective interests of the group is one of the risks which the union employee agrees to take when he joins the union. This risk becomes unacceptable only when the state fails or refuses to provide adequate review of the arbitrability of the issue or does not provide separate statutory and judicial remedies for individual constitutional or federally mandated statutory rights. *Vaca v. Sipes*, 386 U. S. 171 (1967); *Breish v. Ring Screw Works*, 397 Mich. 586, 248 N. W. 2d 526 (1975). However, no claim of unfair representation was made in this case until McDonald instituted his § 1983 case.

Less than one year ago, this Court commented on the importance of the application of the traditional preclusion concept to § 1983 actions. It stated:

> "[t]he federal courts consistently have applied res judicata and collateral estoppel to causes of action in issues decided by state courts. *Allen v. McCurry*, 449 U. S. 90, 96, 101 S. Ct. 411, 416, 66 L. Ed. 2d 308 (1980); *Montana v. United States*, 440 U. S. 147, 99

S. Ct. 970, 59 L. Ed. 2d 210 (1979); *Angel v. Bullington*, 330 U. S. 183, 67 S. Ct. 657, 92 L. Ed. 832 (1946). Indeed from *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195 (1877); to *Federated Department Stores, Inc. v. Moitie*, 452 U. S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981), this Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts have been established, the conclusive resolution of disputes within the jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been made in that action. *Allen v. McCurry*, 449 U. S. at 94, 101 S. Ct. at 14; *Cromwell v. County of Sac*, 94 U. S. at 352. Under collateral estoppel, once the court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. *Montana v. United States*, 440 U. S. 147, 158, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210. *Parklane Hosiery v. Shore*, 439 U. S. 322, 326, n. 5, 99 S. Ct. 645, 649, n. 5 (1979). Thus, invocation of res judicata and collateral estoppel 'relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'' *Allen v. McCurry*, 449 U. S. at 94, 101 S. Ct. at 414.

When a state court has adjudicated a claim or issue, these doctrines also serve to "promote the comity between state and federal courts that has been recognized as the bulwark of the federal system". *Kremer v. Chemical Construction Corp.*, 456 U. S. 461, 102 S. Ct. at 1889-90, n. 6.

Petitioner presents no convincing evidence of why an exception to the traditional preclusion doctrine should be made in this case other than to make a federal forum avail-

able to him for relitigation of his grievance. A federal forum was available to him in the first instance and he chose a different forum. Simply because he received an unsatisfactory result, he should not be allowed to relitigate his claim in a federal court. He bargained for resolution of his grievances within the format of the collective bargaining agreement. Having received the benefits of this bargain, he should abide by his contractual obligation to honor the decision of the arbitrator. *Smith v. Dawes,* 614 F. 2d 1069 (5th Cir. 1980).

Public policy arguments mitigate against stretching *Alexander* to apply to § 1983 cases. It was reported in *Patsy v. Board of Regents,* 102 S. Ct. 2557, 2577 (1982), that in 1981 alone, over 30,000 civil rights actions were filed in federal district courts. Creating a right of *de novo* review in federal court in § 1983 cases will not serve to increase the quality of justice. Our federal courts are so overwhelmed that without the important policies of finality and repose, the federal court system will become a dream rather than a reality.

Indeed, withholding preclusion in this case will achieve the exact opposite result intended by Congress in enacting § 1983. It will encourage labor unions and state courts to abrogate their responsibilities rather than encourage more efficient and acceptable dispute resolution.

Private labor arbitration has been a successful development of private self-government. It respects the individual right to resolve grievances in a forum comfortable to employers and employees. It is still relatively inexpensive as compared to civil remedies. It responds faster to the areas of contention. It promotes the national goals of peace in the work place.

Without continued support, unions, management and arbitrators will lose the freedom to operate without judicial intrusion.

CONCLUSION

For these reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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